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FEBRUARY 27. 1765.

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A N S W E R S

F O R

ADAM CRAWFURD - NEWAL of Pol-
quhairn;

T O T H E

68
PETITION of *Hugh Mitchell* in *Wa-*
terhead of *Nith*, *William Macilwraith*
younger of *Dalreoch*, and *Allan Gil-*
mour in *Privick*, alias *Annbank*.

OF this date, the respondent sold to *James Mitchell* May 17th,
younger of *Rigg*, twenty one black cattle, at the 1763.
price of 57 *l. Sterling*; for which sum, *Mitchell*, of
the same date, accepted a bill to the respondent,
payable against the term of *Lammas* thereafter.

That the said *James Mitchell* did, upon the said 17th of
May, purchase from *John Tennent* in *Coretown*, fifty one
black cattle, at the price of 147 *l. Sterling*, and which, at
the same time, were delivered over to *Mitchell*.

Mitchell being in the most bankrupt circumstances when
he made the foresaid purchases, was proceeding the very
next day with his cattle, to carry them out of the country;
but sundry of his creditors, viz. *Allan Gilmour*, *Hugh Mit-*
chell,

May 18th, 1763. *chell*, and *William Macilwraith*, the petitioners, of this date, the very next day after the purchase of said cattle, did, in virtue of letters of horning, at their instance against the said *James Mitchell*, poind and carry off the said cattle, and many others, to the number of seven score and two, as belonging in property to him.

That the respondent being informed of this pretended poinding, and that the same was to be completed on the 19th day of the said month of *May*, at the market cross of *Cumnock*; but before they had reached that place, the respondent compeared with a notary publick and witnesses, and having separated the cattle sold by him from the others that had been poinded, represented to the messenger, and *Gilmour* one of the poinders, that these cattle were his property, and had been purchased from him the day before the poinding; that the sudden failure of the circumstances of his debtor, gave him right to reclaim the cattle, and craved, that the messenger would return them. But this having been refused, the respondent protested, that the poinders should be liable for the price, and for the damages he might incur in recovering it; and the respondent renewed the same requisition and protest at the market cross.

The respondent thereafter applied by petition to the sheriff of *Ayr*, setting furth the fact, and craving warrant for securing the cattle, until the poinders found caution to implement whatever should be decerned in the event of this competition; and, in case they refused to find such caution, to ordain the cattle to be delivered up to the respondent, upon his finding caution, or at least to sequestrate the cattle during the competition.

May 30th,
1763.

This petition was appointed to be served upon the poinders, which was accordingly done; and the sheriff, in the mean time, ordained the cattle to remain where they were.



John

John Tennent, in like manner, applied to the sheriff, and obtained a warrant for detaining his cattle, until answers were lodged to his petition. May 31st, 1763.

After this, the poinders presented a petition to the sheriff, for removing the embargo laid upon the cattle; on advising of which, the sheriff, of this date, "Granted warrant to sell, by public roup, the whole cattle so poinded, upon *Monday* the sixth of the said month of *June*; ordained the roup to be intimated to the persons who claimed the foresaid cattle, that they might attend if they thought proper, ordained the cattle bought from each of them, to be roup'd separately in parcels, and appointed *William Allison* messenger in *Ayr*, to be Judge of said roup." June 2d, 1763.

In consequence of the foresaid warrant, the roup did proceed, the cattle were sold, and bills taken for the price, payable to the sheriff clerk of *Ayr*, for the behoof of all concerned.—The cattle sold by the respondent, were resold at 56 l. 3 s. 6 d. *Sterling*, and those sold by *John Tennent*, were resold at 143 l. 6 s. 6 d. *Sterling*. June 6th, 1763.

The respondent, in his own name, and as assignee of *John Tennent*, brought an action against the poinders, concluding against them for payment of the prices at which the foresaid cattle were sold to *Mitchell*, with annualrent due thereon since *Lammas* 1763; at least, to have it found and declared, that he is intitled to demand and take up from the sheriff clerk of *Ayr*, the whole bills taken by him for the price of the said cattle; and also concluding against Mr. *Charles Dalrymple* the sheriff clerk, that he should either deliver up the foresaid bills to the respondent, or pay to him the contents thereof.

This action having come in course before the Lord *Elliot* Ordinary, his Lordship, upon advising full minutes of debate, of this date pronounced the following interlocutor: Dec. 8th, 1764.
 "The Lord Ordinary having considered the foregoing minute of debate, with the writs produced, in respect it is
 "alleged

“ alledged by the pursuer, and not denied upon the part
 “ of the defenders, that *Mitchell* is insolvent, and that next
 “ day after the bargain made for, and delivery of the black
 “ cattle in question, fled the country, and has not been
 “ heard of since: Finds, That the bargain on the part
 “ of *Mitchell* was fraudulent, and that the property
 “ of the cattle was not transferred to him, so as
 “ to be attachable by his creditors in prejudice of the
 “ pursuer: And in respect the said cattle were sequestrated
 “ by the sheriff depute of *Ayr*, upon application of the
 “ pursuer, and were thereafter sold by warrant of the said
 “ sheriff, and the price paid into the sheriff clerk's hands,
 “ or bills or other securities taken therefor, in his name, for
 “ behoof of all concerned; therefore finds, that the pursu-
 “ er is preferable to the defenders, the creditors of *Mitchell*,
 “ for the proceeds of the said cattle so sold; and therefore
 “ ordains Mr. *Charles Dalrymple*, sheriff clerk of *Ayr*, to
 “ pay over to the pursuer the price received by him for said
 “ cattle, and to deliver up and assign to the pursuer the
 “ bills or other securities that were taken for the said price,
 “ in so far as the same have not been paid to him, and de-
 “ cerns.”

Jan. 25th, 1765. And, upon advising a representation and answers, his
 Lordship, of this date, pronounced this interlocutor: “ Ha-
 “ ving considered this representation, with the answers made
 “ thereto for the pursuer, and letter produced with the said
 “ answers, by which *James Mitchell* acknowledges his in-
 “ solvency, and that he had intimated a meeting of his
 “ creditors; which letter bears date the 19th day of *May*
 “ 1763, being the second day after the purchase of the cat-
 “ tle libelled; refuses the desire of the representation, and
 “ adheres to the former interlocutor.”

The petitioners have reclaimed to your Lordships; and
 the petition having been appointed to be seen and answer-
 ed,

ed, this is humbly offered upon the part of the respondent.

And, with submission, the interlocutors of the Lord Ordinary stand upon clear and solid grounds: *Mitchell* was undoubtedly in the most bankrupt circumstances when he purchased these cattle upon the 17th of *May* 1763; even before this time, he was under ultimate diligence. The very next day after the purchase, he is found upon the road to *England* with a considerable drove of cattle, of which these in question were a part: The cattle are pointed by his creditors; after which he runs off, and appears no more in public; but is absconding from the diligence of his creditors: Whether he left that part of the country immediately, is immaterial: If he was absconding, it must have the same effect in law. And this appears evident; for, upon the 30th *May*, he is entered in the Abbey books, as having retired to that sanctuary; and some time thereafter, he went off for the *East Indies*.

Most of these facts are notorious, and the whole of them could be easily proved. At the same time, a proof in this case will be altogether unnecessary; because it is proved by the letter of the 19th *May* 1763, two days after the date of the purchase of the cattle from *Mitchell* to Mr. *Macgill* of *Kingancleugh*, that he had intimated a meeting of his creditors, to make a total surrender to them, as he was no longer able to stand his ground.

The letter is recited *verbatim* in the petition; and it clearly establishes, that a *fori cessio* was made by the bankrupt within two days of the sale of the cattle in question; and therefore, upon the principles established in the case of *Cave's* creditors, and which has hitherto been constantly held to be law, the purchase was a most fraudulent transaction upon the part of *Mitchell*: The law presumes, that *dolus dedit causam contractui*; and consequently, the sale being null and void, the property was not transferred; a *rei*

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B

vindicatio

vindicatio was competent at the instance of the sellers : And if so, *multo magis* must they be preferable to anterior creditors of the bankrupt, pretending to carry off the cattle by legal diligence.

To bring a bankrupt under the predicament of the fore-said decision, it is by no means necessary, that a person be bankrupt in terms of the statute 1696 ; (altho', if that was necessary, *Mitchell* was likewise under that description ; because, at the same time that he was notoriously insolvent, he was absconding from the diligence of his creditors :) But, as has been already observed, that is not necessary to be urged in this case ; many a man has given way, who never became bankrupt, in terms of the statute 1696 ; and yet, according to the principle established by the fore-said decision, every purchase made within three days of the *fori cessio*, must be deemed fraudulent, and will intitle the seller to reclaim his own goods.

And indeed, the present case is much stronger than that of *Cave's* creditors : For, in that case, the bargain was made three months before the *fori cessio* ; and which therefore might have been presumed to have been made *bona fide* by the bankrupt ; and yet the seller was found preferable, as to such goods as were delivered within three days of the *fori cessio* : Whereas, in this case, your Lordships will observe, that the bargain was made only two days before an intimation to his creditors of making a total surrender to them ; after which he absconded ; in a few days thereafter retired to a sanctuary ; and, at last, fled out of the kingdom.

Mitchell therefore, was not only guilty of a gross fraud in receiving the cattle ; but it be must presumed *presumptione juris et de jure*, that the sale was made with a fraudulent intention.—The sale was consequently *funditus* null and void ; the property was not transferred, and the respondent would be well founded in a *rei vindicatio* of the subjects.

At

At the same time, it is not necessary to carry the point so far; the question is not here with a second purchaser from the bankrupt, but with his creditors, pretending to affect them with legal diligence; and therefore, can only take them *tantum et tale*, as they were in him; nor ought they to be allowed to avail themselves of his fraud. The plea of the respondent is most favourable, and founded in the clearest principles of equity.—He is *certans damnum vitare*; whereas the petitioners are attempting *lucrum captare* from this sale; and upon these principles, it was decided in favours of the sellers, in the well known case, *Prince contra Pallet*, 22d December 1680, observed by Lord Stair; as also, *Mair contra Maxwell*, 18th January 1715, observed by Bruce: And the same thing was found in a late case, contained in the Faculty collection, viz. 20th February 1752, *Forbes contra Main*; in which last case, *Elizabeth Rolland* having obtained a *cessio bonorum*, and having thereafter begun to trade as formerly, and having commissioned a parcel of wines from Messrs. *Mains* and company, merchants in *Lisbon*, the same, upon their arrival at *Leith*, were arrested by one of her anterior creditors; and your Lordships preferred the sellers to the arrester.

It is said in the petition, that the purchase of these cattle, and delivery of them upon the 17th, upon a bill's being granted for the price, affords sufficient evidence, that *Mitchell* at that time was of good credit in the country where he resided; so that, at this time it is clear and evident, that he had no intention *cedere foro*, but that he was in the course of providing a stock of cattle for the *English* markets, which trade he had carried on for several years before; and that it is obvious from every circumstance of his conduct, that he intended to return to his own country, after the sale of the cattle at the *English* market; for that he did not secret or dispose of any of his effects, but left his stocking and servants upon his farms, in the same manner he was accustomed

stomed to do in former times. That supervening insolvency, is no proof of either actual or intentional fraud ; but the fraud must be proved, either by positive and direct proof, or from facts and circumstances ; and that altho', in the case of *Cave's* creditors, it was established, that the *cessio fori* supervening *intra biduum vel triduum* of the purchase and delivery, inferred a fraudulent purpose and intention ; yet, that is only established *presumptione juris*, and which must yield to truth, or to stronger presumptions ; and that that presumption is in this case sufficiently redargued by the circumstances of the case.

But, in the *first* place, *Mitchell's* credit was very much suspected for some months before the date of the transaction in question ; and accordingly it appears, that sundry hornings had been taken out against him in the months of *March* and *April* preceeding ; yea, some of his creditors, particularly, *George Johnston* merchant in *London*, took out a caption against him for 105 *l. Sterling*, in the month of *March* preceeding ; and the poidings now in question, execute the very day after the sale, do clearly show the embarrassed situation his affairs then were in, tho' the respondent and cedent were most unwarily led in to trust him.

But, *2do*, It can have no influence upon the present question, even altho' it should appear, that he was in good credit : It can prove no more than this, that the country were deceived about his circumstances ; and indeed, a question of this nature cannot well occur, without supposing such a deception. A man in bankrupt circumstances will not be trusted ; but as in law and reason, it will be presumed, that a man is acquainted with his own situation ; so, when a man in bankrupt circumstances possesses himself of other peoples effects, and gives way in two or three days thereafter, the law does presume, that the same was done with a fraudulent intention ; and the respondent humbly apprehends, that this presumption is established, *presumptione juris*

et de jure.—If actual fraud could be proved, it would be sufficient, altho' the bargain and delivery had been made long before the *fori cessio*; but where the same does happen within two or three days of the bargain or delivery, the respondent apprehends, that it affords an invincible proof of fraud.

At the same time, it is unnecessary to enter into the question, Whether cases may occur, attended with such circumstances, that the law will hold a bargain to be fair and honest, notwithstanding of the purchaser's giving way within three days of the sale? It is sufficient to say, that no such circumstances do here occur, which can make this case an exception from the general rule that was most solemnly established in the case of *Cave's* creditors.—On the other hand, the circumstances of this case do tend much to strengthen the legal presumption: For, when it is considered that *Mitchell* was at the time of the purchase in such desperate and bankrupt circumstances, that he had not the least reason to expect to stand his ground; that at the same time, there was a train of diligence going on against him, at the instance of his creditors; that upon the cattle's being seized, he absconds, and soon thereafter flies the country, and has never hitherto returned: It must give conviction, that he was going off with these, in the view of not returning; and that he truly intended, not only to defraud the respondents, but likewise his whole other creditors, of the price from thence arising. And what strongly strengthens this presumption, is, that (as the respondent has been informed) when he went off with the cattle, he carried along with him all the papers that he had of any value: And as to what is said, that he left his stocking upon his farms, as usual; the fact is, that he was carrying the bulk of it along with him, and any part of the stocking that remained, which was but trifling, and which was probably left for a blind to his creditors, that they might not take the alarm, the same was pointed upon the same day that the cattle in question were pointed. But it is unnecessary to insist upon these circumstances, as the fraud is sufficient—

ly established, by his giving way within two days of the sale, and is of itself sufficient to prefer the respondent in the present competition.

It is said in the petition, that the space of time that intervened between the purchase of these cattle, and the actual *cessio*, delivers them from the presumptive fraud, and throws the *onus probandi* upon the respondent; that this purchase was, *de facto*, made with a fraudulent intention, *mox cedere foro*; for that it is not true, that *Mitchell* immediately absconded, and fled the country after the pointing, for that for several days after the pointing, he appeared publicly, and did not retire to the sanctuary till the 30th of May.

Whether *Mitchell* immediately left the country, or not, upon the pointing, is immaterial; as, according to the respondent's information, he did not afterwards appear publicly. But, *2do*, It is of very little consequence how these facts do stand: It is sufficient to say, that he gave way immediately after the pointing. And accordingly, it appears from the fore said letter of the 19th May, which was only two days after the sale in question, that he made a formal intimation thereof to his creditors, and had called a general meeting of them, in order to make a total surrender to them: And accordingly, in that letter, he begs of the gentleman to whom it is addressed, that he would take the trouble of being a trustee for behoof of his creditors.

The respondent does not found upon this letter to prove actual fraud against *Mitchell*. It is not to be imagined, that *Mitchell* would condemn his own conduct, by publishing any thing fraudulent upon his part: On the contrary, it is natural to imagine he would endeavour to palliate his conduct as much as possible. But the letter clearly establishes this fact, that *Mitchell foro cesserat* within two days of the sale. This is sufficient for the respondent's purpose; for if that be established, the sale, of consequence, must be deemed fraudulent.

In respect whereof, &c.

RO. MACQUEEN.

